84-169

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ROY MAXWELL LISTER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

PAUL G. KOMAREK
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ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. It violated the defendant's Fifth Amendment right to a fair trial when the trial judge, who had previously excluded "similar acts" testimony erred in reversing that ruling, with no on-the-record inquiry as to the prejudicial effects of that evidence.

2. Was there sufficient evidence to support the petitioner's requested jury instruction on good faith reliance on an expert, when reliance was the petitioner's theory of the defense?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued:

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals, Case No. 82-3205 is reported in 730 F.2d 683 (11th Cir. 1984), and appears at Appendix A. This opinion affirmed the conviction of the petitioner in the trial court.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Eleventh Circuit Court of Appeals was entered on April 23, 1984. The date of the order denying the petitioner's petition for rehearing was May 30, 1984. This petition for a writ of certiorari was filed less than sixty (60) days from that date. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The facts necessary to properly understand the issues raised in this petition, briefly stated are:

A. Course of the Proceedings Below.

On October 6, 1982, in a cause then pending in the United States District Court for the Northern District of Florida, entitled the United States v. Roy M. Lister, et al., Case No. 82-00208 (Panama City Division), petitioner was found guilty by a jury of five counts, of a twelve count indictment.

The petitioner was charged in one count of conspiring from on or about March 1, 1978, until August 31, 1980, with other individuals, by using or making false statements in documents submitted to the Small Business Administration and Farmers Home Administration,

which were applications for loan guarantees for the purchase of various businesses. In the following eleven counts the petitioner was charged with various substantive offenses for specific false statements allegedly made. After a trial, the petitioner was convicted of five counts, one count being the conspiracy count (Count I) of violating Title 18, U.S.C., §1001, and Title 18, U.S.C., §371, and the other four counts were for allegedly violating in four instances Title 18, U.S.C., §1001, prohibiting the making of false statements to a Government agency (Counts II, VI, VII, and VIII). The petitioner was acquitted of Counts III, IV, IX, and X. The trial judge had previously granted the petitioner's motion for a directed verdict at the close of the government's case on Counts V, XI and XII.

Judgments were entered by the District Court, Judge Maurice Paul presiding, on December 13, 1982, in accordance with the verdicts returned by the jury. The petitioner, Roy Maxwell Lister, was given a total sentence of one year imprisonment, a $25,000.00 fine, and five years probation.

The judgment and sentence were confirmed by the Court of Appeals for the Eleventh Circuit, United States v. Johnson, Case No. 82-3205, 730 F.2d 683 (11th Cir. 1984), and a petition to this Court for a writ of certiorari was timely filed, after a denial of a petition for rehearing was entered on May 30, 1984.

All references to the record of these proceedings will be abbreviated by "R", succeeded by page, and line if necessary. The transcript of the trial will be referred to and be abbreviated by "T", preceded by

the volume number and succeeded by page number and line as above indicated. The following format for references to the transcript will be used necessitated by the Court Reporter's system for its preparation. The format follows:

VOLUME	EXCERPT OF TESTIMONY
1 - NICK C. MASON	9/28/82
2 - PAMELA E. WELLS	9/30/82
3 - WILLIAM J. DASSINGER	9/30/82
4 - WILLIAM J. DASSINGER	10/04/82
5 - LYNN HILL	10/04/82
6 - IRA HILL, JR.	10/05/82
7 - ROY MAXWELL LISTER	10/05/82
8 - ROBERT A. JOHNSON	10/05/82
9 - TRIAL TRANSCRIPT	9/27/82
10 - " "	9/28/82
11 - " "	9/29/82
12 - " "	9/30/82
13 - " "	10/04/82
14 - " "	10/05/82
15 - " "	10/06/82

This petitioner joined in all motions and objections made at the trial of the three defendants, and for the purposes of the appeal, the petitioner joins in all points raised by all defendants in petitions

for a writ of certiorari filed contemporaneously herewith.

B. Relevant Facts Necessary to Determine the Issue Presented.

The petitioner accepts the statement of the facts as set forth in the opinion below rendered by the Eleventh Circuit Court of Appeals, and reported at 730 F.2d 684-86, reproduced in the Appendix hereto at pages A-1 through A-37.

Additionally, at the trial in this case the key government witness, Nick Mason, was prohibited by the trial judge after a motion in limine by all defendants below, from testifying to a sales transaction whereby a mortgage between L & H Properties, Inc. and I & E Enterprises, Inc., was sold to Southern Discount Association, where the original mortgage was alleged to be fraudulent. Southern Discount Association was a private

lending institution, and Ira Hill, Jr., was the common shareholder in both L & H Properties, Inc., and I & E Enterprises, Inc.

With regard to this transaction, which all the defendants objected to at trial, the trial judge ruled that the evidence was inadmissible. However, the trial judge later reversed himself when he ruled that petitioner's counsel had "opened the door" in his cross-examination of Nick Mason, when counsel inquired as to the petitioner's ownership interest in L & H. (1 T 176). Any other facts necessary for a more complete understanding are contained within the argument itself, under this issue.

Also, all defendants requested a jury instruction because their main defense at trial was that they had relied upon Nick Mason, the key government witness, who was the certified public accountant for I & E,

a corporation owned by Ira ("Buddy") Hill, Jr. There was much testimony as to the business relationship between Mr. Hill, and Mr. Mason, at the trial, and yet the trial court rejected the defense request for such an instruction, even when it was worded to the satisfaction of the trial judge. The evidence in the court below was clear that Hill, and Robert Allen Johnson, another co-defendant, had given the information for the preparation of the applications to both the Small Business Administration and Farmers Home Administration, for loan guarantees, and that Mason had prepared those applications utilizing information given to him, and further that he held himself out as an expert in the preparation of such applications. These applications passed through the hands of your petitioner in their submission to both of these federal agencies.

All the defendants in the court below relied upon Mason's expertise in properly preparing applications of this type, including this petitioner (7 T 6-7).

ARGUMENT

IT VIOLATED THE DEFENDANT'S FIFTH AMENDMENT RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE, WHO HAD PREVIOUSLY EXCLUDED "SIMILAR ACTS" TESTIMONY ERRED IN REVERSING THAT RULING, WITH NO ON-THE-RECORD INQUIRY AS TO THE PREJUDICIAL EFFECTS OF THAT EVIDENCE.

The petitioner has been deprived of a fair trial in the lower court, in violation of the Fifth Amendment to our Constitution which requires due process of law.

Of all the defendants in the trial court below the government's weakest case was against this petitioner, a fact evidenced by the appellate court's own admission. United States v. Johnson, et al., 730 F.2d 683 (11th Cir. 1984). Thus there can be no doubt that any improperly admitted evidence which reflected upon the petitioner prejudiced him greatly.

The American criminal law system is deliberately weighted in favor of defendants

accused of crime. We are concerned with the suppression of crime but we are equally concerned with the necessities of justice and respect for man's dignity. The burden upon the prosecutorial authorities of proof of guilt beyond a reasonable doubt is the most demanding quantum of proof known to the law. See comments of Lord Sankley in Woolmington v. D.P.P., AC 462, 481, 25 Cr. App.Rep. 72, 95 (H.L. 1935); A. S. Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," 69 Yale L. J. 1149-99 (June 1960). This is so because modern government is very powerful, the chief repository of the enormous power of organized society. It is inherently an unequal contest. The weaker party is protected by built-in safeguards since inequality breeds injustice. When a formal charge is laid it is obvious to the most shallow juror that someone in public

authority believes that a crime was actually committed and by the accused. The guarantee that fairness will prevail in the face of this inequality, often lost sight of in the affray of trial, are the procedural due process rights guaranteed to all members of our pluralistic society. However, "guarantees" are hollow indeed if they are ignored due to the press of trial dockets, conservation of judicial time, or increasing loads of complex conspiracy trials (mostly drug based) upon our appellate courts. No right is more important than due process of law since it is the fountain or the well-spring of all others. Conspiracy charges, "the darling of the modern prosecutor's nursery", to quote J. Learned Hand, are particularly susceptible to the maxim of allowing the trees to obscure the forest.

> Due process of law is more, however.
>
> Let it not be overlooked that due process of law is not for the sole benefit of the accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice . . .

Justice Jackson in Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224 (1953)(dissenting opinion).

At the trial of this cause the government attempted to introduce testimony by its witness Nick Mason, about a separate transaction, unrelated to the charges, between two corporations -- L & H Properties, Inc. and I and E Corporation (hereinafter referred to as L & H and I & E) -- and a third corporation which purchased from I & E a mortgage given to it by L & H. This third corporation was the Southern Discount Association (hereinafter SDA). All defendants objected to the introduction of SDA transaction evidence prior to Mason taking the stand; this motion

was granted but then later the trial judge, with no explanation, reversed his earlier ruling when it ruled that petitioner's counsel had "opened the door" in cross-examination of Mason with regard to L & H Properties. (1 T 176).

The testimony that the appellate court found had "opened the door" to the entire SDA transaction follows:

> Q. Isn't it true that you know of or had knowledge that Roy Lister and Buddy [Hill] never really put that corporation in effect as being together, in other words, Lister and Hill [L & H]?
>
> A. It's my understanding it was a dummy corporation, dummy corporation.
>
> . . . . . .
>
> Q. It was not put into-was not used by Mr. Lister, as far as you know, ever put into effect by him or Mr. Lister?
>
> A. No, sir. That is not correct.
>
> Q. I am saying it was not put into effect by Mr. Lister. Maybe you misunderstood my question.

A. They used that corporation in another deal on the Transmitter Road property, on Trailer City Estates.

Q. You're stating Mr. Lister was involved in that?

A. Yes, sir, he was.

Q. All right. As a stockholder or officer of the corporation.

A. He was involved in obtained[sic] a second mortgage on-

Q. I'm not asking you that. I'm asking you if he was involved as a stockholder or an officer?

A. I don't know that.

Set out in Appendix A, 730 F.2d at 691. It can easily be seen that defense counsel only touched on the L & H company, yet the entire, complex, irrelevant I & E -- SDA transaction was later allowed.

To make matters worse, Mason did not know and would not testify under oath that Roy Lister, this petitioner, even was involved in L & H. He testified, on rebuttal, responding to government questioning that he

"assumed" Lister and Hill owned L & H, and the trial judge ordered this testimony stricken after a defense objection. (1 T 217).

This SDA transaction should not have been admitted because it was not a "similar act." After the prejudicial testimony was erroneously allowed, numerous defense witnesses testified, without rebuttal, that the petitioner had nothing to do with the transaction in any way. Since Roy Lister was not involved, it could not be a "similar act". It was not a "similar act" since it failed under the test, which was binding on the Eleventh Circuit, set down in United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)(en banc), cert.den., 440 U.S. 920 (1979), and applied in United States v. Robinson, 700 F.2d 205, 212 (5th Cir. 1983). Under the Beechum doctrine such evidence could be used to prove the defendant's intent or motive if it was: (1) relevant

to the charged crime, and (2) not unfairly prejudicial. Beechum at 913; Robinson at 212. Clearly this transaction failed on point (1).

As to its prejudicial effect, assuming arguendo relevance, there is here no on-the-record analysis by the trial court of relevance vs. prejudice to guide us, just as there was none in Robinson.

> An express scaling on-the-record of probative value and prejudice would tend to ensure appropriate consideration at trial of all relevant factors, establish the basis for the court's ruling, and provide the needed record for proper appellate review. On-the-record findings and conclusions would thus further the efforts of both the trial and appellate court to follow the Rule 404(b) analysis mandated by Beechum.

Robinson at 213.

The Robinson court held that the Rule 609 prior criminal conviction analysis, which also involved a weighing process,

had evolved into requiring an on-the-record finding that the probative value outweighed the prejudice involved in allowing prior conviction evidence. See e.g. United States v. Preston, 608 F.2d 626 (5th Cir. 1979), cert.den. 446 U.S. 940 (1980). Robinson found the purpose of the prejudice elements of Rules 609 and 404(b) sufficiently similar "to warrant in all Rule 404(b) cases an on-the-record articulation by the trial court of Beechum's probative value/prejudice inquiry when requested by a party". An objection is tantamount to a request. Just as in Robinson all the SDA transaction evidence was moved in limine for exclusion in the case at bar. Thus, should relevance be found this case should be remanded for a similar determination by the trial judge. However, it is submitted the record reflects that there is no possible way the probative

value of this evidence could outweigh its prejudice.

However, to by-pass this dilemma, of clearly having prejudicial evidence, which even the trial judge had recognized and earlier had excluded, and clearly having a witness testifying to it based upon an "assumption" that the petitioner was involved, the Eleventh Circuit Court of Appeals found:

> Because we find that the testimony was properly admitted as rebuttal evidence and did not violate F.R.Evid. 403, we need not address the defendant's argument based on F.R.Evid. 404(b).

730 F.2d at 690.

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The appellate court then quoted from the examination below which was alleged to have "opened the door", previously herein set forth. It then went on to reason as follows:

> Lister's familiarity and involvement with Hill's business affairs was a fact of consequence to the government's case, especially for the count alleging that Lister knew that Hill's statement that he was buying FTS from his father was false. The extent of Lister's involvement with L & H, therefore, was a significant fact, and Lister's role in the fictitious mortgage scheme was probative to his involvement in the partnership and his knowledge of Hill's business affairs. The probity of the mortgage scheme was further enhanced once defense counsel attempted to establish on cross-examination that Lister never actively participated in L & H.
>
> Against the evidence's probative value, we must weigh the danger of prejudice. Here, the danger presented was that the jury would convict Lister based on the fictitious mortgage scheme involving L & H rather than on the evidence introduced for the charged offense. United States v. Beechum. ... Although

> the district court may have been correct in initially determining that the prejudicial effect of the mortgage scheme outweighed its probative value, the court properly ruled that once defense counsel "opened the door" on cross-examination, by implying that Lister never really participated in L & H, the scheme's probative value was enhanced such that it outweighed its prejudicial effect. On redirect, therefore, the government was entitled to elicit rebuttal testimony from Mason as to whether Lister and Hill had in fact used L & H for business, and Mason's testimony about the mortgage scheme served that purpose. Moreover, the judge gave the jury cautionary instructions on the use of similar acts evidence both immediately after the testimony and during its closing charge, thus further minimizing the danger of prejudice. Beechum, 582 F.2d at 917. We conclude that the judge did not abuse its discretion in admitting the testimony as rebuttal evidence to show Lister's involvement with L & H Properties.

730 F.2d at 691.

However, the cold fact is that Mason only assumed the petitioner's involvement,

and upon this slender thread the entire irrelevant and highly prejudicial transaction was allowed, when all defense counsel had done was ask Mason about the L & H corporation; no question was ever asked by defense counsel about any part of the transaction so he could not have opened the door. See e.g., United States v. Barrentine, 591 F.2d 1069, 1081 (5th Cir. 1979).

Thus the transaction was not similar, it was prejudicial, not relevant, and in addition it has long been held that the "open the gate" theory will not permit eliciting incompetent and prejudicial evidence on redirect. The opponent of such evidence should be allowed to take advantage of such an "opening" only if he can show that he is prejudiced unless he can meet the evidence, which is not the case here. See 1 Wigmore, Evidence §15.

There being no on-the-record weighing by the trial judge of the relevance vs. prejudice of this transaction evidence, as required in the Fifth Circuit but not the Eleventh Circuit Court of Appeals, the petitioner has been deprived of a rational basis for review of the error, and of a fair trial.

A fair trial being denied to the petitioner, he respectfully requests this Court to reverse and remand with instructions for a new, and a fair trial.

WAS THERE SUFFICIENT EVIDENCE TO SUPPORT THE PETITIONER'S REQUESTED JURY INSTRUCTION ON GOOD FAITH RELIANCE ON AN EXPERT, WHEN RELIANCE WAS THE PETITIONER'S THEORY OF THE DEFENSE.

Filed contemporaneously with this Petition is the Petition For a Writ of Certiorari of Ira Hill, Jr., this petitioner's co-defendant, along with Robert Allen Johnson, in the court below. As he has on his appeal to the Eleventh Circuit Court of Appeals this petitioner adopts in total the argument of petitioner Hill under this rubric.

Further this petitioner submits that should certiorari be granted as to Hill on this issue, that it also be granted to him. If reversal is mandated, it is submitted that this case should also be reversed for a new trial as to this petitioner under authority of Glasser v. United States,

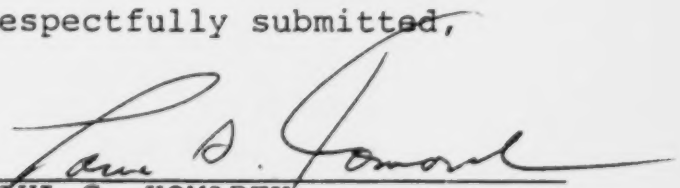
315 U.S. 60, 86 L.Ed. 680, 62 S.Ct. 457 (1942) (where error as to one defendant in a prosecution for conspiracy requires a new trial be granted to him, the rights of his co-defendants to a new trial depend on whether that error also prejudiced him). It is submitted that the error as to Hill was compounded as to your petitioner since in relation to all the defendants the government's case was weakest as to him. Also the petitioner relied upon the expertise of Mason as a certified public accountant who was an expert in the preparation of FHA and SBA loan guarantee applications (which consisted of large packets of materials) (7 T 6-7).

This case should be reversed for a new trial.

CONCLUSION

This Court should grant this Petition for Writ of Certiorari in order to reconcile the decision of the Eleventh Circuit Court of Appeals with the other Courts of Appeal, the prior decisions of this Court, and the Constitution of the United States.

Respectfully submitted,



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ATTORNEY FOR PETITIONER
ROY MAXWELL LISTER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served have been served, including the Solicitor General, Department of Justice, Washington, D.C. 20530, by regular U. S. Mail with the foregoing Petition For A Writ of Certiorari, this 27th day of July, 1984.

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ROY MAXWELL LISTER

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Robert Allen JOHNSON, Roy Maxwell
Lister and Ira Hill, Jr.
Defendants-Appellants.

No. 82-3205

United States Court of Appeals
Eleventh Circuit

April 23, 1984

OPINION

Appeals from the United States District Court for the Northern District of Florida.

Before GODBOLD, Chief Judge, RONEY and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

The appellants, Ira Hill, Jr., Roy Lister and Robert Johnson, were indicted on one count of conspiracy to submit false statements to a federal agency and eleven counts of submitting false state-

ments and documents to federal agencies in violation of 18 U.S.C. §1001. A jury found all three appellants guilty of conspiracy. Additionally, Hill was convicted of eight of the eleven counts of submitting false statements and documents, Johnson of five, and Lister of four.

The convictions arose out of Hill's attempt to sell various businesses by financing the sales through loans guaranteed by the Small Business Administration (SBA) and the Farmers Home Administration (FHA), both of which are federal agencies. The loan applications were first submitted to the Wewahitchka State Bank, were they were reviewed and recommended to the federal agencies by defendant Lister, then president of the bank and officer in charge of the loans. Defendant Johnson was the prospective

purchaser of one of the businesses, Florida Trailer Sales (FTS), and Pamela Wells, the woman he lived with, was the prospective buyer of another business, Eastgate Mobile Home Park. Hill also attempted to obtain a loan guarantee from the SBA for the sale of the Big Chief Truck Stop to another individual, Joe Dassinger.

The government contended at trial that the documents submitted to the SBA and FHA contained a number of false statements. These statements formed the basis for the various counts in the indictment:

(1) In the personal history form for Johnson submitted to the SBA to guarantee the purchase of FTS, it was represented that Johnson had never been arrested for, charged

with, or convicted of a criminal offense. Johnson had in fact been convicted of two prior felonies. All three defendants were convicted of this count (Count II)[1].

(2) A representation to the SBA that $50,000.00 deposit had been paid by Johnson towards the purchase of FTS, which the government contended had not actually been made (Count III). All three defendants were acquitted by the jury on this charge.

(3) A representation in the personal financial statement to the SBA that Johnson had assets exceeding his liabilities of $83,000 (Count

1. Count 1 charged the defendants with conspiracy to submit false statements, with the remaining counts alleged as the overt acts taken to effectuate the conspiracy.

(Count IV). The jury found only Johnson guilty of this charge.

(4) A representation to the SBA that Johnson had made an additional $10,000.00 down payment toward the purchase of FTS, which the government contended had not been made (Count V). Johnson and Hill were found guilty; Lister's motion for a directed verdict was granted.

(5) A statement in Hill's personal history form for the purchase of FTS that he had never been arrested for, charged with, or convicted of a criminal offense, when he had in fact been previously convicted of two counts of tax evasion (Count VI). Hill and Lister were found guilty on this count; Johnson's motion for a directed verdict was granted.

(6) A letter from Lister to the SBA stating that Hill intended to purchase FTS from his father, when allegedly Hill already owned the business (Count VII). Lister and Hill were found guilty on this count; Johnson's motion for a directed verdict was granted.

(7) A representation to the SBA in Hill's financial statement for the purchase of FTS that Hill's net worth was $163,000.00, which the government alleged was untrue (Count VIII). Hill and Lister were found guilty; Johnson's motion for a directed verdict was granted.

(8) A representation to the FHA in a loan application for the purchase of Eastgate Mobile Home Park that Hill's net worth was 3.3 million

dollars, which the government alleged was untrue (Count IX). Hill was found guilty and Lister was acquitted; Johnson's motion for a directed verdict was granted.

(9) A representation to the FHA that Pamela Wells had made a $5,000.00 down payment towards the purchase of Eastgate, and would make an additional down payment of $35,000.00 at closing, which representations the government alleged were untrue (Count X). Hill and Johnson were found guilty and Lister was acquitted.

(10) A statement to the FHA that Wells' assets exceeded her liabilities by $126,800.00, which the government alleged was untrue (Count XI). Johnson was found guilty and Hill was acquitted; Lister's motion

for a directed verdict was granted.

(11) A representation to the SBA that Joe Dassinger had made a $10,000.00 down payment toward the purchase of the Big Chief Truck Stop, which the government contended was untrue (Count XII). Hill was found guilty; Johnson and Lister's motions for directed verdicts were granted.

The government attempted to prove the allegations mainly through the testimony of Nick Mason, Hill's Certified Public Accountant. Mason testified at length how he, Hill and Johnson had knowingly falsified information in an attempt to secure the loan guarantees for the various sales. Mason also testified about two transactions, unrelated to the charges, in which Hill,

Lister and Johnson allegedly had engaged in similar fraudulent schemes.

The government called several other witnesses. FBI Special Agent Gene Halley related how Johnson had confessed that he, Hill, Mason and Lister had embarked upon a scheme to fraudulently obtain government loan guarantees. Pamela Wells, the prospective purchaser of the Eastgate Mobile Home Park, testified that the financial information she had provided was false and that the falsified information was submitted with the knowledge of Hill and Mason.

All three defendants took the stand. Both Johnson and Hill readily admitted that they had prior convictions, but contended that they had relied on Mason to fill out the SBA and FHA applications and were unaware that Mason had falsified the applications in

this respect. They also testified that their statements of financial worth and the disputed down payments were basically accurate and that any false statements were made without their knowledge. Lister's main defense was that he had failed to review the applications and thus was unaware of the false statements in the applications. He also denied knowledge of the allegedly nonexistent down payments.

I. The Expert Advice Instruction

The appellants first contend that the trial court erred in denying their request for an instruction on the defense of good faith reliance on an expert. They argue that they were entitled to such an instruction because their main defense at trial was that they had relied on their CPA, Nick

Mason, as an expert in filling out SBA and FHA applications for loan guarantees. The trial court refused to give the instruction because it found that the defense was inapplicable to the facts of the case. We agree.

[1] The defense of good faith reliance on expert advice is "designed to refute the government's proof that the defendant intended to commit the offense". United States v. Miller, 658 F.2d 235, 237 (4th Cir. 1981). To succeed, the defendant must show that (1) he fully disclosed all relevant facts to the expert and (2) that he relied in good faith on the expert's advice. United States v. Smith, 523 F.2d 771 (5th Cir. 1975), cert.. denied, 429 U.S. 817, 97 S.Ct. 59, 50 L.Ed.2d 76 (1976).[2]

2. The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981),

[2] The flaw in the defendants' argument is that no expert advice was given to the defendants on which they relied. The charges against Hill, Johnson and Lister are not of the type where reliance on expert advice is relevant:

> (1) Hill and Johnson do not contend that Mason advised them to lie about their past criminal records,[3] but simply that they were unaware that the false statements were included in the applications.

adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

3. Indeed, if they had claimed that they relied on Mason's advice in lying about their criminal records, such a claim would clearly be outside of the "good faith" prong of the expert advice defense.

(2) The appellants also do not argue that they relied on Mason in calculating either theirs or Pamela Wells' financial assets, but instead claim that the statements were in fact substantially accurate and they did not know of any inaccuracies.

(3) Likewise, they do not claim that Mason advised them to falsely claim that down payments had been made, but rather that the down payments had either been made or that they did not knowingly claim that nonexistent down payments had been made.

(4) Finally, although Hill testified at trial that Mason advised him to transfer the stock of I & E Corporation to his father, the issue at trial was not whether such a transaction was legal (to which

the defense would arguably apply), but whether the transfer of stock ever took place, which reliance on expert advice was not relevant.

The appellants' defenses at trial, therefore, are properly characterized as claims that they did not willfully and knowingly make false statements, [4] and not as contentions that they relied on expert advice in making such statements.

The district court was not required to "grant a request that [did] not concern issues properly before the jury . . ." United States v. Goss, 650 F.2d 1336, 1344 (5th Cir. Unit A 1981). The court did not err, therefore, in denying the appellants' request for an

4. The appellants do not argue that the district court erred in its instructions on what constitutes "wilfully" and "knowingly".

instruction on the expert advice defense.

II. The Currative Instruction for Defendant Hill's Outburst

[3] During Mason's testimony, Hill stated in a loud voice, "He is lying." The court dismissed the jury and informed the defense counsel that he intended to give a curative instruction to the effect,

> Any comments you may have heard in the courtroom from people not under oath should be disregarded by you and play no part in your decision.

Defense counse made no objection to the proposed instruction, and the court proceeded to give substantially the same instruction to the jury:

> Ladies and gentlemen of the jury, immediately prior to the break there was some statement made by some individuals in the courtroom who were not at that time testifying under oath. I would advise you that any comments you may have heard in

> this courtroom from people who are not under oath, should be disregarded by you and play no part in the consideration of your verdict. Do you understand that? Do you have any problems with that? All right.

Again, none of the defendants objected.

Johnson and Lister now argue that the instruction's references to "some individuals" and to "people" prejudicially implied that they were responsible for Hill's outburst. The argument is frivolous. The judge's proposed instruction referred to "people," but the defendants did not object; nor did they object when the charge was given to the jury. Without an objection, the instruction must have constituted "plain error" for us to consider it. United States v. Smith, 700 F.2d 627 (11th Cir. 1983). The alleged error here, however, was not "both obvious and substantial" and thus does not warrant our considera-

tion. See id.

III. Limiting the Number of Character Witnesses

Appellant Johnson next argues that the district court erred in limiting the number of character witnesses that the defense could call to testify as to Mason's truthfulness.[5] Hill's counsel had called three witnesses who testified to their lack of trust in Mason, after which the government made a motion to

5. Hill adopts Johnson's argument. Lister also purports to adopt Johnson's argument, but states that his objection is to the limitation of cross-examination of Mason and Pat Lister. He points to no prejudicial error in those instances where the trial court limited questioning of Mason and we find that sufficient cross-examination was allowed such that the court did not abuse its discretion. Greene v. Wainwright. 634 F.2d 272, 275 (5th Cir. 1981). The limitation on the questioning of Pat Lister came during direct, not cross-examination, and thus at most is an argument that the court improperly limited character evidence, see infra note 5.

prevent further character evidence against Mason. Hill's counsel indicated that he had no additional character witnesses, and the court noted, "that took care of itself".

The government argues, based on the above exchange, that the trial court never actually ruled on the government's motion to limit character evidence. When a later witness was on the stand, however, Hill's counsel stated, "Your Honor, again, I would proffer the testimony of this witness in regards to the truthfulness of Nick Mason." The government objected and the trial court ruled that the testimony would be cumulative.[6] We find, therefore, that the

6. Johnson also points to the direct examination of Pat Lister where she was asked "Has [Mason] on occasion lied to you," and the government's general objection was sustained. It is unclear as

trial court did limit the amount of character evidence against Mason.

[4, 5] The decision to limit the number of character witnesses and the amount of character evidence is within the trial court's discretion. Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948). The appellants maintain that here the trial judge improperly limited the number of character witnesses to three, citing for support United States v. Gray, 507 F.2d 1013 (5th Cir. 1975). Gray, however, stands only for the proposition that a trial judge should not use an "unvarying rule" as to the number of character

to whether the government was objecting on hearsay grounds or because her reply would be character evidence. Because we find that the court did limit the defense's introduction of character evidence, we need not decipher the basis of the court's ruling.

witnesses allowed without regard for the circumstances of the case, because such a "rule" would be arbitrary and not an exercise of discretion. Gray is inapplicable to the case at hand, as the judge did not rely on an "unvarying rule" but determined that any further character evidence would be "cumulative". Nor do we find after reviewing the record that the district court abused its discretion in limiting the number of character witnesses or the amount of character evidence against Mason. We agree with the district court that the three character witnesses called by the defense were given ample opportunity to express their distrust of Mason, and that any further testimony would not have significantly aided the jury in assessing Mason's credibility.

IV. Sufficiency of the Evidence

[6] Both Johnson and Lister challenge the sufficiency of the evidence for their convictions. Such challenges are governed by the standard outlined in United States v. Bell, 678 F.2d 547, 549 (5th Cir. Unit B)(en banc), aff'd on other grounds, ____ U.S. ____, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983):

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

In making this assessment, an appellate court must view the evidence in the light most favorable to the government, Glasser v. United States, 315 U.S. 60,

62 S.Ct. 457, 86 L.Ed. 680 (1942), and accept reasonable inferences and credibility choices by the factfinder, United States v. Gonzalez, 719 F.2d 1516, 1521-22 (11th Cir. 1983).

A. Johnson's Convictions

[7] Applying the Bell standard in viewing the evidence in the light most favorable to the government, Glasser, supra, there is ample evidence to support Johnson's convictions for conspiracy and his other convictions arising out of the FTS and Eastgate loan guarantee applications.

First, we find there is sufficient evidence to support Johnson's conviction for conspiracy to submit false statements to a federal agency. Mason, whose credibiliy was an issue for the jury, directly testified to a number of occasions where he, Hill and Johnson

together discussed how to fraudulently obtain federal loan guarantees. Moreover when asked by the FBI "if he could testify to the fact that Hill, Lister and Mason conspired together and brought the forms to him to sign in regard to the SBA loan and that Johnson knew these loans to be false," Johnson replied "that's the truth of the matter". As the discussion below of Johnson's conviction for false statements also makes evident, a reasonable jury would have had no trouble concluding beyond a reasonable doubt that overt acts were done in furtherance of the conspiracy.

Mason testified directly to Johnson's knowledge of the false statements in the FTS application. He stated that Johnson knew the personal history forms claimed that Johnson had

no prior convictions and that he, Johnson and Hill had laughed about the form as they filled it out. Likewise, Mason testified that Johnson knew that the financial statement claiming Johnson had a net worth of $83,000 was false and that he and Johnson had together come up with the figure "out of the air." The government also introduced documentary evidence from which a jury could have reasonably found that Johnson's supposed $10,000 down payment on FTS was a sham; the evidence showed that Johnson and Hill had exchanged checks on the same day for $10,000 the net result being that no down payment was actually made.

Sufficient evidence was also introduced to support Johnson's convictions arising out of the Eastgate application. Johnson admitted that he had negotiated Pamela Wells' alleged $40,000 down

payment, and Mason testified that Johnson knew there was never any intention that the down payment would actually be paid. Both Mason and Wells also testified that Wells' financial statement for the loan guarantee on Eastgate was false and that Johnson was extensively involved in the arrangements for Eastgate's purchase. From this evidence, a reasonable jury could conclude beyond a reasonable doubt that Johnson participated in the misrepresentation of Wells' financial worth.

B. Lister's Convictions

We also find sufficient evidence to support Lister's conviction for conspiracy. Mason expressly stated at trial that he had discussed with Lister the inclusion of false statements in the loan guarantee applications. Johnson in

his statement to the FBI replied affirmatively when asked whether a conspiracy involving Hill, Lister and Mason existed. In addition to this direct evidence of Lister's involvement, there is substantial circumstantial evidence of Lister's participation in the conspiracy: he was the officer who processed the applications and submitted them to the SBA and FHA, and, although he claimed he did not know the false statements were in the forms, he admitted he knew Johnson and Hill had prior convictions;[7] he signed the letter to the SBA stating Hill intended to buy FTS from his father, even though, as the government's evidence convincingly showed, he knew that Hill owned FTS;

7. Lister's defense, that he was unaware that the false statements were in the applications, was of course an issue for the jury.

and, as Mason testified, Lister was the individual who advised Mason on how much collateral they would need to claim to qualify for the loan guarantees. Based on the above direct and circumstantial evidence, a reasonably cautious jury could have found beyond a reasonable doubt that Lister was part of the conspiracy.

[8] The government's evidence against Lister as to the substantive counts was not as strong as that against Hill and Johnson. We need not, however, find independent evidence of Lister's direct participation in each substantive count of which he was convicted, because "[a] conspirator can be found guilty of a substantive offense based upon acts of a coconspirator done in furtherance of the conspiracy, unless the act 'did not fall within the scope of the unlawful

project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.'" United States v. Moreno, 588 F.2d 490, 493 (5th Cir. 1979), cert. denied, 441 U.S. 936, 947, 99 S.Ct. 2061, 2168, 60 L.Ed.2d 666 (quoting Pinkerton v. United States, 328 U.S. 640, 647-48, 66 S.Ct. 1180, 1184-85, 90 L.Ed. 1489 (1946). As the district court properly instructed the jury, to find Lister guilty there only needed to exist sufficient evidence for the jury to conclude that other coconspirators committed the acts with which he was charged and that such acts were a forseeable part of the conspiracy.[8]

8. The Moreno court did note that the doctrine of vicarious guilt may have due process limitations. 588 F.2d at

Such a finding is supported by the record. Among other evidence, Mason directly testified to Hill's and Johnson's participation in those counts of which Lister was also found guilty. Moreover, the acts were aimed at the accomplishment of the conspiracy's goal, obtaining federal loan guarantees, and thus were clearly foreseeable. The jury, therefore, could have reasonably found Lister guilty of the substantive counts.

V. Extrinsic Acts Evidence

[9] On redirect, Mason testified to a real estate transaction in which Lister, Johnson and Hill allegedly used false financial statements to obtain and sell a fictitious second mortgage on

493. As in Moreno, however, attributing the acts of Hill and Johnson to Lister is not so attenuated that such due process concerns would apply here.

some property. The judge initially had ruled that such testimony was inadmissible. On redirect, however, the judge allowed Mason to testify about the transaction because defense counsel during cross-examination had asked Mason about Lister's involvement in L & H Properties, a partnership between Lister and Hill and one of the companies involved in the fictitious mortgage scheme. The judge ruled, therefore, that defense counsel had "opened the door" and Mason would be allowed to testify as to Lister's involvement in L & H. After Mason's testimony, defense counsel moved for an instruction on use of "similar acts" evidence under Federal Rule of Evidence 404(b). The government contends that the evidence was properly admitted because it was used as a response to defense counsel's implica-

tion on cross-examination that Lister was not involved with L & H Properties. Because we find that the testimony was properly admitted as rebuttal evidence and did not violate F.R.Evid. 403, we need not address the defendant's argument based on F.R. Evid. 404(b).

Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

We must determine, therefore, whether the testimony was relevant and, if so, whether its probative value outweighed its prejudicial effect.

On cross-examination, Lister's counsel had the following exchange with Mason:

Q. Isn't it true that you know of or had knowledge that Roy Lister and Buddy [Hill] never really put that corporation in effect as being together, in other words, Lister and Hill [L & H]?

A. It's my understanding it was a dummy corporation, dummy corporation.

. . . . . .

Q. It was not put into--was not used by Mr. Lister, as far as you know, ever put into effect by him or Mr. Lister?

A. No, sir. That is not correct.

Q. I am saying it was not put into effect by Mr. Lister. Maybe you misunderstood my question.

A. They used that corporation in another deal on the Transmitter Road property, on Trailer City Estate.

Q. You're stating Mr. Lister was involving in that?

A. Yes, sir, he was.

Q. All right. As a stockholder or officer of the corporation.

A. He was involved in obtaining a second mortgage on--

Q. I'm not asking about that. I'm asking you if he was involved as a stockholder or an officer?

A. I don't know that.

Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Lister's familiarity and involvement with Hill's business affairs was a fact of consequence to the government's case, especially for the count alleging that Lister knew that Hill's statement that he was buying FTS from his father was false. The extent of Lister's involvement with L & H, therefore, was a signi-

ficant fact, and Lister's role in the fictitious mortgage scheme was probative to his involvement in the partnership and his knowledge of Hill's business affairs. The probity of the mortgage scheme was further enhanced once defense counsel attempted to establish on cross-examination that Lister never actively participated in L & H.

Against the evidence's probative value, we must weigh the danger of prejudice. Here, the danger presented was that the jury would convict Lister based on the fictitious mortgage scheme involving L & H rather than on the evidence introduced for the charged offense.[9] Cf. United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978) (en

9. The danger that the defendant would be convicted based on the extrinsic

banc). Although the district court may have been correct in initially determining that the prejudicial effect of the mortgage scheme outweighed its probative value, the court properly ruled that once defense counsel "opened the door" on cross-examination, by implying that Lister never really participated in L & H, the scheme's probative value was enhanced such that it outweighed its prejudicial effect. On redirect, therefore, the government was entitled to elicit rebuttal testimony from Mason as to whether Lister and Hill had in fact used L & H for business, and Mason's

offense and not the charged offense is the same danger presented by similar acts evidence under Rule 404(b). Our analysis differs here from that for Rule 404(b) because we consider the evidence's relevancy in terms of rebuttal on redirect and not for the purposes outlined in Rule 404(b), such as showing motive, opportunity or intent.

testimony about the mortgage scheme served that purpose. Moreoever, the judge gave the jury cautionary instructions on the use of similar acts evidence both immediately after the testimony and during its closing charge, thus further minimizing the danger of prejudice.[10] Cf. Beechum, 582 F.2d at 917. We conclude that the judge did not abuse its discretion in admitting the testimony as rebuttal evidence to show Lister's involvement with L & H Properties.

VI. Conclusion

Having found sufficient evidence to support appellants' convictions and having found no prejudicial error at trial, the convictions are AFFIRMED.

10. Although the cautionary instruction is generally used for Rule 404(b)

extrinsic acts evidence, we find that it served a similar purpose here in minimizing the prejudicial nature of the rebuttal evidence.